

**RICHARD P. METTKE -vs-  
TOUCHNET INFORMATION SYSTEMS, INC.**

**JOHN F. MURPHY, 6/16/98**

**BOWEN MOTTER REPORTING - (816) 421-2876**



Page 1

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHEAST DISTRICT OF ALABAMA  
3 EASTERN DIVISION  
4  
5 RICHARD P. METTKE, )  
6 Plaintiff, )  
7 vs. ) No. 98-PT-596-E  
8 TOUCHNET INFORMATION SYSTEMS, )  
9 INC., )  
10 Defendant. )  
11  
12 THE DEPOSITION OF JOHN F. MURPHY, taken on  
13 behalf of the Plaintiff June 16, 1998, at the law  
14 offices of Spencer, Fane, Britt & Browne, 1400  
15 Commerce Bank Building, 1000 Walnut, Kansas City,  
16 Missouri.  
17 A P P E A R A N C E S  
18 For the Plaintiff: Tobor & Goldstein  
19 1360 Post Oak Blvd., Ste 2300  
20 Houston, Texas 77056-3023  
21 By Mr. John T. Polasek  
22 For the Defendant: Spencer, Fane, Britt & Browne  
23 1000 Walnut, Suite 1403  
24 Kansas City, Missouri 64106  
25 By Mr. Richard P. Stitt

Page 2

1 S T I P U L A T I O N S  
2 It is hereby stipulated and agreed by and  
3 between the parties herein that presentment to the  
4 attorneys of record of a copy of this deposition shall  
5 be considered submission to the witness for his  
6 signature within the meaning of Federal Rules of Civil  
7 Procedure; but shall in no way be considered as a  
8 waiver of the witness' signature, and is to be signed  
9 at any time before the time of trial; and if not  
10 signed by time of trial, may be used with the same  
11 force and effect as if signed.  
12  
13  
14 I N D E X  
15 WITNESS: PAGE  
16 JOHN F. MURPHY  
17 Examination by Mr. Polasek 3  
18 Examination by Mr. Stitt 26  
19 Further Examination by Mr. Polasek 37  
20  
21 SIGNATURE: 40  
22 CERTIFICATE: 41  
23  
24  
25

Page 3

1 JOHN F. MURPHY,  
2 a Witness, of lawful age, being produced, sworn and  
3 examined on behalf of the Plaintiff, deposeth and  
4 saith:  
5 EXAMINATION  
6 BY MR. POLASEK:  
7 Q Mr. Murphy, would you state your name for the  
8 record?  
9 A John F. Murphy.  
10 Q Mr. Murphy, have you been deposed before?  
11 A No.  
12 Q Okay. First time?  
13 A Yes, it is.  
14 Q Well, I am sure you have had an opportunity to  
15 talk to your counsel today to discuss what we are  
16 going to be doing here, but I think I will go  
17 through a couple of the ground rules so to speak.  
18 First, is that the court reporter just gave you  
19 the oath. I will represent to you that it is the  
20 same oath that you would take down at the  
21 courthouse, meaning it has the same force and  
22 effect as if you were testifying in front of the  
23 judge. Do you understand that?  
24 A Yes, I do.  
25 Q Great. Second of all, in response to my

Page 4

1 questions, if you would, answer yes or no or give  
2 an explanation as needed as opposed to a nod of  
3 the head or uh-huh or a huh-uh.  
4 A Okay.  
5 Q Excellent. And if you need to take a break at  
6 some point in the deposition, please let me know.  
7 A Okay.  
8 Q It is my understanding that you are an employee of  
9 TouchNet Information Systems?  
10 A Yes, I am.  
11 Q Okay. How are you employed with TouchNet?  
12 A My title is vice president of market development.  
13 Q And what does the vice president of market  
14 development do?  
15 A I do a combination of deciding what markets we go  
16 into. I sell into the markets and I help  
17 determine strategy for what the company does.  
18 Q And how long have you been in this position?  
19 A This position, since I think 1992.  
20 Q And prior to that, how were you employed with  
21 TouchNet?  
22 A I was hired in May of 1990 as marketing manager.  
23 And my job as marketing manager was to help  
24 determine what business we should be in and also  
25 be a salesman to sell our solution.

JOHN F. MURPHY, 6/16/98

Page 5

1 Q Are you from Kansas or Missouri?  
 2 A I grew up in St. Louis. Moved to Kansas City 13  
 3 years ago two days ago.  
 4 Q Do you have a college degree?  
 5 A I have a bachelor of science in business  
 6 management from the University of Missouri,  
 7 graduated 1985, emphasis in finance.  
 8 Q Any postgraduate degrees?  
 9 A No.  
 10 Q I am going to show you what is marked as Exhibit 2  
 11 and ask you if you have seen this document before?  
 12 A Yes, I have.  
 13 Q Okay. This is TouchNet's answer to interrogatory  
 14 No. 1, correct?  
 15 A Yes, it is.  
 16 Q On page 5 of the interrogatory answer, you are  
 17 listed as one having personal knowledge of the  
 18 information in this answer. Can you tell me what  
 19 information you supplied in responding to this  
 20 interrogatory?  
 21 A I supplied a copy of the videotape. I supplied  
 22 letters that I had sent to BellSouth. I supplied  
 23 invoices on the video production work and I think  
 24 some other documents. →  
 25 MR. STITT: Roll back a page.

Page 6

1 THE WITNESS: Billing invoice for VPR  
 2 Creative Group. And, as I said, letters to  
 3 BellSouth offering for sale our service.  
 4 Q (By Mr. Polasek) Okay. On page 6 there's a  
 5 verification. Is that your signature there?  
 6 A Yes, it is.  
 7 Q In Mr. Toughey's deposition that we just completed  
 8 a few minutes ago, he testified that pay-as-you-go  
 9 access to the internet was not available on  
 10 TouchNet or, in fact, is still not available on  
 11 TouchNet terminal. Do you agree with that?  
 12 A I agree with that.  
 13 Q He indicated that TouchNet has current plans to  
 14 release or activate such a model in the very near  
 15 future?  
 16 A I agree with that.  
 17 Q Within the next 30 days or so?  
 18 A I don't know the timing.  
 19 Q Do you know where this particular model will be  
 20 utilized?  
 21 A Primarily in airport locations.  
 22 Q Do you have any models that are so equipped but  
 23 not operating in place at the present time?  
 24 A Yes, we do.  
 25 Q Can you tell me where?

Page 7

1 A Oh, they are in airports across the country. For  
 2 example, St. Louis Lambert International Airport,  
 3 Orlando International Airport.  
 4 Q Kansas City Airport?  
 5 A In Kansas City we have kiosks operating, yes, but  
 6 they do only pay-per-use fax services.  
 7 Q And pay per use fax services is what TouchNet has  
 8 been in for the past several years, correct?  
 9 A Correct. We have done pay-per-use facsimile  
 10 services really since 1989 and adding pay-per-use  
 11 access to on-line services has really been  
 12 available since I think the early '90s. And I  
 13 know for a fact in 1992 and 1993 we had the  
 14 capability of doing that.  
 15 Q I would like for you to take a look at what has  
 16 previously been marked as Exhibit 4. That is your  
 17 affidavit.  
 18 A Oh, right here.  
 19 Q If you want to take a minute to look at that, I  
 20 have some questions about some of the -- I have a  
 21 few questions about the affidavit as well as some  
 22 questions about the exhibits attached to it.  
 23 A Okay. I'm ready.  
 24 Q When did access to Prodigy become a service that  
 25 was on the TouchNet terminal?

Page 8

1 A When was it --  
 2 Q When was it first available for use by a user of  
 3 the terminal?  
 4 A I'm not sure when Prodigy was first available as a  
 5 commercial on-line service. It could have been  
 6 available on an earlier version of our software  
 7 that would even be back in 1991. My first  
 8 recollection of one of our kiosks showing Prodigy  
 9 working on it was at a trade show in 1993.  
 10 Q In May of 1993?  
 11 A Yes. Because May of 1993, my recollection was at  
 12 a SuperCom trade show in Chicago.  
 13 Q Okay. And if you would take a look at the letter  
 14 that is dated June 11th '92 and the attachments to  
 15 that particular document, that seems to indicate  
 16 that Prodigy access was available?  
 17 A And the answer is yes, it would have been and yes,  
 18 it was.  
 19 Q Okay. Well, just a minute ago you testified that  
 20 the first use on the terminal was in May of '93?  
 21 A No.  
 22 Q I am trying to understand.  
 23 A I misunderstood the question. The Prodigy  
 24 software has been available for access on the  
 25 public terminals since 1992. The first time I

Page 9	Page 11
<p>1 remember showing it at a trade show was in 1993.</p> <p>2 That's the question I thought you asked.</p> <p>3 Q When was it first placed on a TouchNet terminal?</p> <p>4 A I don't recollect the exact date, but I know that</p> <p>5 we had Prodigy in our office as a software in,</p> <p>6 again, the early '90s. I would guess it would be</p> <p>7 1992.</p> <p>8 Q When you say we had it in the office, are you</p> <p>9 talking about on your own PC or something at the</p> <p>10 office as opposed to a terminal that was for use</p> <p>11 by the average user on the street?</p> <p>12 A Well, certainly we had it in our office as</p> <p>13 something to be used by office personnel. And</p> <p>14 that same software that we had in 1992 was</p> <p>15 available to launch external programs, one of them</p> <p>16 could have been Prodigy.</p> <p>17 So the way I see it, we had Prodigy available</p> <p>18 and Prodigy could have been launched by our</p> <p>19 terminals. That is why we were offering to sell</p> <p>20 it because we had the ability for launching</p> <p>21 on-line services at that time.</p> <p>22 Q Okay. Referring back to your June 11, 1992,</p> <p>23 letter, I noted it is unsigned.</p> <p>24 A Oh, this is my original copy. This is my copy of</p> <p>25 it.</p>	<p>1 this letter, I sent the letter.</p> <p>2 Q Okay. And how do you know that you sent the</p> <p>3 letter?</p> <p>4 A Because I wouldn't have a copy of it if I wouldn't</p> <p>5 have had completed it and sent it.</p> <p>6 Q Are you saying that you never retained working</p> <p>7 drafts of letters?</p> <p>8 A Correct. Normally I don't. That is why I have</p> <p>9 very few copies, because most of my correspondence</p> <p>10 was saved on computer hard drives. The fact that</p> <p>11 I don't have a signed copy of this doesn't mean</p> <p>12 that I didn't send it. In fact, I have an idea</p> <p>13 why this might not be signed. I had a computer</p> <p>14 modem, fax modem. It is possible that this was</p> <p>15 faxed directly from my computer and then printed</p> <p>16 out copy later.</p> <p>17 Q Okay. If that is the sequence of events that did</p> <p>18 occur, would you have some document, a hard copy</p> <p>19 of a fax transmission report or something of that</p> <p>20 nature?</p> <p>21 A No, because if it went directly from my computer,</p> <p>22 it would just be software sending this file out</p> <p>23 and I -- then I printed the file out. I would</p> <p>24 have printed the file out afterwards.</p> <p>25 Q Is there any way to ascertain -- if that sequence</p>
Page 10	Page 12
<p>1 Q Do you have a copy of the signed original -- of</p> <p>2 the signed letter?</p> <p>3 A No, I don't.</p> <p>4 Q Is there any way -- where did you get a copy of</p> <p>5 this letter?</p> <p>6 A From my files.</p> <p>7 Q When you say your files, was it on your computer</p> <p>8 files or was it in --</p> <p>9 A No.</p> <p>10 Q -- correspondence file?</p> <p>11 A It was in a paper file. This letter was written</p> <p>12 in 1992, you know, on an old version of Windows on</p> <p>13 a computer I don't have anymore on an old version</p> <p>14 of Word that I don't have anymore. The originals,</p> <p>15 you know, we have correspondence, you know, in my</p> <p>16 job offering these things for sale to a lot of</p> <p>17 people. I had a lot of correspondence. A lot of</p> <p>18 that over the years has been thrown away. It just</p> <p>19 so happened that I kept a file that had some</p> <p>20 BellSouth things and I was able to find a copy</p> <p>21 that I had sent.</p> <p>22 Q Since it is unsigned, do you have any additional</p> <p>23 documentation that would show that this letter was</p> <p>24 actually sent to Mr. Funk?</p> <p>25 A No, I don't. But if the question is did I send</p>	<p>1 of events did occur, is there any way to ascertain</p> <p>2 whether Mr. Funk got a copy of the letter?</p> <p>3 A Well, I think we probably could look at all the</p> <p>4 history of long distance services to whatever his</p> <p>5 fax number was in June of 1992. I would think</p> <p>6 there would be a copy, there would be a record.</p> <p>7 But I have no knowledge if he picked up the fax on</p> <p>8 the other side of the fax machine, if he --</p> <p>9 Q Okay. I would like for you to take a look at the</p> <p>10 next letter that is attached to your declaration.</p> <p>11 That is a July 13, '92, letter?</p> <p>12 A Correct.</p> <p>13 Q The first line references Information Services</p> <p>14 Gateway which is to be launched in Orlando. Do</p> <p>15 you recall what that refers to?</p> <p>16 A Yes, BellSouth. This is a subset of BellSouth,</p> <p>17 this company, Linda Coyner worked for a division</p> <p>18 of BellSouth that was going to be putting out a</p> <p>19 service in Orlando that they were calling the</p> <p>20 Information Services Gateway. That is my</p> <p>21 recollection of it.</p> <p>22 Q They were putting out a service?</p> <p>23 A BellSouth was putting out -- they were putting out</p> <p>24 enhanced fax services. If it wasn't BellSouth, it</p> <p>25 was another company that was going to be doing a</p>

Page 13

Page 15

1 trial of enhanced communication services in  
 2 Orlando. This letter -- in fact, this one was  
 3 obviously printed out because it is on our  
 4 letterhead that I had sent -- I had sent her an  
 5 article on the fact that I had seen that their  
 6 service was going to be launched in Orlando and  
 7 then I was saying that our services could be  
 8 another add-on to their services.  
 9 Q In addition to the services that they offered?  
 10 A Correct.  
 11 Q Okay. And the services that they were offering  
 12 were fax services?  
 13 A I think the services that they were offering were  
 14 not only fax but also other messaging services.  
 15 Q You mean e-mail?  
 16 A I don't know if it was e-mail. I know that they  
 17 were offering other messaging services. They were  
 18 -- most of them were going to be telephony based.  
 19 In fact, one thing I do remember they were going  
 20 to offer was the ability of having all of your  
 21 birth dates in a system and it would call you to  
 22 tell you to remind you that there was a birthday  
 23 coming up. Now, that's very small subset of my  
 24 recollection of what the whole Information  
 25 Services Gateway was.

Page 14

1 Q Okay. The third paragraph references or says  
 2 that, "We also have the ability to work with you  
 3 on offering a special interface, credit card, and  
 4 billing structure for your customers. It makes no  
 5 sense to have the capability of your platform and  
 6 have people reluctant to use it because they don't  
 7 understand the conventional pay fax purchase or  
 8 are turned off by the high prices charged to  
 9 access the services."  
 10 The services that you are -- what services  
 11 were you referencing there in that particular  
 12 paragraph of your letter?  
 13 A The specific service I was referencing there was  
 14 they had a fax mailbox system. I don't recall the  
 15 exact name of it, but they were going -- we had  
 16 told them they could put out special cards, that  
 17 there could be a billing system, that their users  
 18 could go to any of our kiosks and insert their  
 19 card, we could read the card, go into their  
 20 network, which essentially was over the network  
 21 that stored a file someplace and bring it -- that  
 22 stored this fax image and bring it back as a file  
 23 and be able to print it out.  
 24 So specifically what I was talking about is  
 25 we would be able to create an interface from our

1 kiosks that would be able to read a special card  
 2 that would be like their billing card to be able  
 3 to access this. And so we would be able to know  
 4 from the card what they were currently using and  
 5 what their mailbox was.  
 6 Q Okay. That was to basically print a document that  
 7 they had previously prepared?  
 8 A Or a document that had been faxed to them. Or  
 9 once we got into their intelligent messaging  
 10 system to be able to access any service that they  
 11 put out on.  
 12 Q And TouchNet charged for that service? Would it  
 13 charge for that service?  
 14 A Well, we were trying to sell these to BellSouth.  
 15 So BellSouth would have decided what they would  
 16 have charged for the service. The capability of  
 17 charging for the service existed. We had the  
 18 ability of launching programs that had  
 19 intelligence to go out and, you know, look at a  
 20 card and validate not only credit card but other  
 21 cards. And our customers really were in charge of  
 22 deciding what they were going to do, how deep they  
 23 wanted to validate it.  
 24 Q All right. There's a handwritten note in the  
 25 lower right-hand corner?

Page 16

1 A Uh-huh.  
 2 Q It looks like your name signed below it?  
 3 A Yes.  
 4 Q Can you tell me what Funnybone fax is?  
 5 A Funnybone fax was a fax template that was a  
 6 service that we had on our machines that you could  
 7 select from a selection of cards, personalize it  
 8 by typing in the information and essentially print  
 9 it out and then pay for it and then send the fax  
 10 someplace else. Linda -- I think I printed out  
 11 one that -- there is one I used to send quite a  
 12 bit that showed that she was like the deal maker.  
 13 And so what I did was I sent a printed one out to  
 14 show her, this would be another service,  
 15 pay-per-use service that we could offer that could  
 16 be faxed.  
 17 Q Do you recall when the spring '93 COMDEX show took  
 18 place?  
 19 A It was in Atlanta and it was either the first week  
 20 of June of 1993 -- I could -- I know it was in  
 21 Atlanta that summer, and I think it was in the  
 22 first part of June. I could probably look here.  
 23 Q I am glad you referred to it as that summer even  
 24 though it is labeled the spring show.  
 25 A Oh, well, that's not my choice of terms. COMDEX

Page 17	Page 19
<p>1 chooses what they call their show. They had</p> <p>2 always called their fall show the fall show and</p> <p>3 then when we added spring it depended on when the</p> <p>4 date was available. It was at Georgia World</p> <p>5 Congress Center.</p> <p>6 Q But your best recollection is that it occurred in</p> <p>7 June of '93?</p> <p>8 A Correct.</p> <p>9 Q I asked Mr. Toughey in the deposition that we took</p> <p>10 earlier today if he could identify anyone that had</p> <p>11 received a copy of what we have marked as Exhibit</p> <p>12 5 for your reference. For your reference, Exhibit</p> <p>13 5 was the video that you, through your attorneys,</p> <p>14 have previously supplied to us. Can you give me a</p> <p>15 list of names of people that have received a copy</p> <p>16 of this video?</p> <p>17 A I do not have a list of names. Certainly when you</p> <p>18 are at COMDEX, there are hundreds of thousands --</p> <p>19 there is 200,000 people at the conference</p> <p>20 streaming by at all times that we were meeting</p> <p>21 giving them copies of our videotape. I don't have</p> <p>22 a sign up record or a distribution list, just like</p> <p>23 I don't have a list of everybody I have ever given</p> <p>24 a brochure to or a, you know, a piece of flier</p> <p>25 material.</p>	<p>1 A Yes.</p> <p>2 Q So that means that these terminals that were at</p> <p>3 the places you have listed in Paragraph 9 were in</p> <p>4 operation prior to May 14 of '93, correct?</p> <p>5 A Yes.</p> <p>6 Q Did those terminals have access to Prodigy?</p> <p>7 A To my recollection, yes.</p> <p>8 Q Did those terminals -- were you able to access the</p> <p>9 internet from those terminals?</p> <p>10 A My recollection at the time -- Prodigy did not</p> <p>11 have a gateway to the internet, because my</p> <p>12 recollection at that time, the internet was really</p> <p>13 only available on military bases and on college</p> <p>14 campuses. It was not a commercial -- it was</p> <p>15 before the world wide web. We were accessing</p> <p>16 Prodigy, though, which was an on-line network that</p> <p>17 had the ability of linking to whatever Prodigy had</p> <p>18 access to, and they had other services that could</p> <p>19 be accessed through Prodigy in 1990 -- the summer</p> <p>20 of 1993.</p> <p>21 Q So whatever services that Prodigy had access to,</p> <p>22 the user had access through the use of this</p> <p>23 terminal?</p> <p>24 A Yes.</p> <p>25 Q When did Prodigy gain an access to the internet?</p>
Page 18	Page 20
<p>1 Q Sure. Has this video, which has been marked as</p> <p>2 Exhibit 5, been given to people outside of the</p> <p>3 COMDEX shows?</p> <p>4 A My recollection is yes.</p> <p>5 Q Would you have a written record of whom -- of the</p> <p>6 people that you have given or that TouchNet has</p> <p>7 given a copy of this video to?</p> <p>8 A No, I don't. About all I can say to that is the</p> <p>9 majority of my correspondence was not printed out.</p> <p>10 It was on computer hard drives. You know, that</p> <p>11 was three operating systems and probably five</p> <p>12 computers ago. Maybe not the exact number, but</p> <p>13 certainly it would not make sense to go to the</p> <p>14 cost of making a videotape and not hand it out to</p> <p>15 anybody.</p> <p>16 Q In your affidavit, page 3, Paragraph 9, you refer</p> <p>17 to several places in which a TouchNet terminal was</p> <p>18 located and operating. Do you see that paragraph?</p> <p>19 A Yes, I do.</p> <p>20 Q As I understand that paragraph of your affidavit,</p> <p>21 terminals were located at the places so listed in</p> <p>22 here at the time that this video was prepared?</p> <p>23 A Yes.</p> <p>24 Q And the video has a date of production of May 14,</p> <p>25 1993?</p>	<p>1 A Oh, I don't know when Prodigy -- I don't know when</p> <p>2 Prodigy provided --</p> <p>3 Q Became a --</p> <p>4 A If you look at it this way, the internet is just</p> <p>5 -- the internet is a colloquial term that stands</p> <p>6 -- there is a protocol called TCP/IP and IP is the</p> <p>7 internet protocol that lets computers talk back</p> <p>8 and forth. In 1993, TCP/IP was not widely spread</p> <p>9 out. And so an on-line service like Prodigy used</p> <p>10 its own proprietary on-line communications</p> <p>11 protocol that we were able to use. But the fact</p> <p>12 that we were able to dial up and access Prodigy,</p> <p>13 if Prodigy would have used TCP/IP at that time and</p> <p>14 spent time on the internet, we would have used</p> <p>15 TCP/IP.</p> <p>16 Q If it had been available? Well, I mean, if the</p> <p>17 access had been available?</p> <p>18 A True. If Prodigy decided to have that be one of</p> <p>19 the pathways in. It is --</p> <p>20 Q Right.</p> <p>21 A I am not a Prodigy expert on their back-end</p> <p>22 architecture, but it wouldn't surprise me that</p> <p>23 Prodigy in some of their internal workings may</p> <p>24 have used TCP/IP to use data around a network,</p> <p>25 hence it would have been the internet as it was in</p>

Page 21

1 1993.

2 Q But that was not available to the users of one of

3 your terminals?

4 A Well, if the users of our terminal came up to use

5 Prodigy and they got Prodigy mail, I don't know

6 how Prodigy sent mail among the different systems,

7 it is very possible that in their backbone they

8 could have used the internet working protocol

9 TCP/IP. And if that is the case, they would have

10 been using Prodigy and using what at the time was

11 internet protocols.

12 Q Okay. You don't know if that was the case back in

13 May or prior to May of '93, which was when this

14 video was shot?

15 A Right. I don't -- right. I don't know the full

16 technical extent of Prodigy's backbone. It is

17 reasonable to assume that Prodigy on their

18 backbone used the same types of communications

19 that has evolved into the internet.

20 Q Do you recall meetings with personnel from Prodigy

21 in which TouchNet supposedly offered a

22 pay-as-you-use billing system for access to

23 Prodigy before it had access to the internet?

24 A I was not involved in any face-to-face meetings,

25 but I was involved in telephone conversations with

Page 22

1 Prodigy.

2 Q Were you involved in conversations in which

3 alternative billing systems were discussed?

4 A To my recollection, yes.

5 Q Well, specifically, do you recall discussing with

6 people with Prodigy a billing system in which a

7 user would insert his credit card into the

8 terminal and be billed on a per-minute basis per

9 his use or her use of the terminals access to

10 Prodigy?

11 A Right.

12 MR. STITT: Excuse me. Did you say

13 permanent basis?

14 MR. POLASEK: Per minute.

15 MR. STITT: Per minute. Excuse me. My,

16 such a deal.

17 THE WITNESS: The intent ultimately was

18 for Prodigy to have access on our machines and the

19 intent was for us to be able to sign up new

20 subscribers for Prodigy and for Prodigy users to

21 be able to use our machines and pay us the time

22 that they were using our machines to be able to

23 access the service for the trial. Because we

24 wanted to see if people would use this and we did

25 not want to scare them away, we did not charge the

Page 23

1 users to use the service.

2 Q (By Mr. Polasek) It was my understanding at the

3 time that you had subscribers, they were people

4 that were already subscribers to Prodigy?

5 A Meaning that could walk up and use the machine?

6 Q They could walk up and use the machine?

7 A Yes.

8 Q Or I guess access it from their own PC?

9 A Yes.

10 Q Okay. And were these discussions to the effect

11 that TouchNet was going to charge such people for

12 use of the TouchNet terminal while they are

13 accessing Prodigy on a per-minute basis?

14 A Yes. That goes back to our original design that

15 we could launch on-line services and have us as

16 owners of the machines be compensated for that.

17 Specifically for Prodigy, the discussions were

18 that for the trial period that Prodigy was

19 available on these machines, we would let people

20 access it for free.

21 Q Did you ever actually implement the system where

22 they were charged on a per-minute basis?

23 A No, we did not, but that was not to say that we

24 couldn't do it. It was -- you have to look back

25 to 1993. There was not many Prodigy members and

Page 24

1 it was a service, while available, it was not

2 commercially viable for us to be -- for users to

3 be doing it.

4 Q Do you recall any of the Prodigy people that you

5 had these discussions with?

6 A There was a man named Dennis Lostenberger

7 (phonetic), who is long since gone from Prodigy.

8 And there was another guy who left Prodigy during

9 the time that we were doing this. Again, you have

10 to put it in context. Prodigy has all of these

11 services. Prodigy -- we even had one up in

12 Canada. I mean, they were technically viable but

13 commercial failures.

14 Q And you are talking about accessing Prodigy or

15 iNet?

16 A I am talking about Prodigy in and of itself. The

17 fact is, we could access Prodigy, an on-line

18 service. The fact is we could charge for that

19 access. The fact is, we chose not to turn on the

20 charging during the trial.

21 Q Okay. Now, again, this is back before you could

22 access the internet from your terminal?

23 A Don't confuse the internet with Prodigy. The

24 internet is really just a communication protocol.

25 What we now term the internet -- when people say

Page 25

1 the internet, they really mean on-line services,  
2 access to e-mail, access to information. That's  
3 what we were doing on Prodigy. Now, the internet  
4 just so happens to be using the internetworking  
5 protocol IP you can get at web sites, you can get  
6 at America On-Line, you can get at Prodigy, which  
7 probably still exists in some format, but we  
8 accessed what was commercially on-line available  
9 in 1993.

10 Q But you were limited to what Prodigy had within  
11 their library, so to speak?

12 A Correct. We were -- the service that we used, the  
13 commercial on-line service was what Prodigy had,  
14 that is what at the time we had on. If there was  
15 another service that wanted to be on our system  
16 that used the internet, as it were, to get mail or  
17 other services, we could have done that also and  
18 charged for it. The fact is we used Prodigy, and  
19 Prodigy at the time used dial-up.

20 MR. POLASEK: Why don't we take a short  
21 break for a few minutes. Let me look at some of  
22 my notes.

23 (Whereupon, a break was taken.)

24 MR. POLASEK: I don't believe I have any  
25 more questions at this time.

Page 26

1 THE WITNESS: All right.  
2 EXAMINATION

3 BY MR. STITT:

4 Q Mr. Murphy, in your affidavit, I believe that is  
5 marked as Exhibit No. 4, there are videos  
6 referenced which were, according to your  
7 testimony, distributed at the COMDEX convention.  
8 Do you have any recollection of how many videotape  
9 copies of Exhibit 5 were manufactured?

10 A My recollection is a box of them, you know, a box  
11 that was big enough for me to carry to the trade  
12 show. My recollection would be in the hundreds if  
13 not more.

14 Q All right. Well, did you throw any of these tapes  
15 away?

16 A It is -- I have no recollection of throwing tapes  
17 away, but they were in our supply closet. And as  
18 we grew as a company, this was not something that  
19 we -- I guess I should say I don't know what  
20 happened to whatever was left over from the trade  
21 shows.

22 Q Okay. You have a guess of how many were left over  
23 from the trade shows? Of the ones you took to the  
24 spring COMDEX, how many did you come back with?

25 A I don't have a recollection, but I do remember

Page 27

1 giving out a lot of videotapes.

2 Q Would you say it is more than 20?

3 A Yes, more than 20.

4 Q More than 30?

5 A I would say myself, personally, I gave out  
6 probably ten a day at the shows and there were  
7 other people giving them out too. So while I  
8 would have given out more than 30, I would guess  
9 that the number given out by other TouchNet  
10 employees would be, again, a wild guess. I would  
11 think it would be over 100.

12 Q What kind of person were these given to? Were  
13 they people who could purchase a kiosk if they  
14 wanted?

15 A Correct. Generally, we wanted to give them to  
16 prospects, not to people -- they were expensive  
17 collateral material. We didn't hand them out to  
18 anybody who wanted them. We handed them out to  
19 somebody who we would hope would become a  
20 customer.

21 Q All right. You have stated during your testimony  
22 that TouchNet devised, installed on it Prodigy  
23 software; is that correct?

24 A Yes.

25 Q Do you recall specifically whether or not during

Page 28

1 the negotiations with Prodigy that it was offered  
2 to them optionally as a pay-per-use charge format?

3 A Specifically --

4 Q Is my question clear?

5 A Well, specifically, that was a decision that we  
6 made because the machines were ours. Prodigy  
7 wanted the software on our machines, and we made  
8 the decision not to charge for the specific  
9 access. We could have just as easily made the  
10 decision to charge for it. And we told Prodigy  
11 one reason we were interested in the relationship  
12 was to help Prodigy sign up new members and for  
13 TouchNet to generate usage revenue by having  
14 access to Prodigy.

15 Q All right. Was it demonstrated to Prodigy that  
16 pay-per-use option was available to them?

17 A Yes, it was.

18 Q Was the machine capable of putting that  
19 pay-per-use charge into effect?

20 A Yes, it was. The software was designed to -- per  
21 each application, it could have a payment amount  
22 that could be charged by service or by minute or  
23 by some minimum plus some other tick charge for  
24 the Prodigy software. We chose essentially to put  
25 in the price as zero.



Page 29

1 Q Let's turn to the internet now. If I want to sign  
2 on to the internet by any computer, who will  
3 charge me for that, for signing on to the  
4 internet?

5 A If you wanted to have access to files that are on  
6 other computers and you wanted to do it over the  
7 so-called internet, you would get an account with  
8 an internet service provider or you could open an  
9 account with America On-Line or Prodigy or any  
10 other on-line service.

11 Q So I can't sign on to the internet and have the  
12 internet charge me for that service, can I?

13 A Correct. The internet is not a service. The  
14 internet is colloquially known -- it is a series  
15 of protocols that route messages across phone  
16 lines to different computers.

17 Q In fact, the internet was initiated by the Central  
18 Science Foundation, isn't it?

19 A Right. The history of the internet goes back to  
20 the internetworking property called IP, which is a  
21 protocol that networks of computers talk to other  
22 networks of computers. It was developed for  
23 military and educational institutions to share  
24 data across different types of computers. The  
25 internet -- now people think of the internet as a

Page 30

1 list of services and files and sites and  
2 essentially those sites are on computers like they  
3 always have been. They can still be accessed  
4 using TCP/IP, but the internet is not a service.

5 Q It is not a -- the internet is not a pay-per-use  
6 service, is it?

7 A No, it is not.

8 Q In fact, if I could get my computer to sign  
9 directly on to the internet, I would be in  
10 communication with nothing. Let me rephrase the  
11 question.

12 A Yeah.

13 Q There is no one operating an internet to charge me  
14 on a pay-per-use basis, right?

15 A I think what you are asking is -- huh. The  
16 internet, right, is not a pay-per-use service.  
17 You can pay a provider that you can log into their  
18 computer that will let you send messages from or  
19 get files from other computers.

20 Q And so the only service they can charge me when I  
21 sign on on-line is a Prodigy or a CompuServe or  
22 one of the entities that we have classified as an  
23 ISP, internet service provider; is that correct?

24 A That is correct. If you as a consumer wanted to  
25 have access to files on other computers over the

Page 31

1 internet, you would pay an ISP, internet service  
2 provider, you would pay an on-line service to  
3 provide you access. Persons at colleges, their  
4 college already has a connection out to the  
5 internet, so I suppose that they are paying a  
6 tuition to the college which would, you know, have  
7 that connection available.

8 Q And so, in fact, the internet is really just  
9 another service option offered by an on-line  
10 service such as Prodigy or CompuServe; is that  
11 correct?

12 A If you log on to an on-line service like Prodigy,  
13 you are using your computer to talk to Prodigy or  
14 your computer to talk to AOL and you can get the  
15 content that AOL or Prodigy has, but then you can  
16 also link from the AOL or the Prodigy to content  
17 that is stored on other computers, whether it is  
18 somebody's web server, whether it is an FTP  
19 server, whether it is a database stored someplace  
20 else.

21 Q And you might link to those other computers  
22 through the internet?

23 A Correct. You would use -- your computer talks  
24 internetworking protocol which let's you get  
25 information from a remote computer by typing in an

Page 32

1 address, whether it is IP address or whether it is  
2 a name like www.touchnet.com.

3 Q Any content that I might want to access is  
4 contained on individual web sites with respect to  
5 the world wide web; is that a correct statement?

6 A Correct. Information is on computers out there  
7 just like information was on Prodigy's computers.  
8 Information is on, you know, company's computers  
9 and you can use internetworking protocols to  
10 access that data.

11 Q And so there is actually, with respect to the  
12 routing computers which make up the internet, no  
13 content on those computers; is that correct?

14 A Correct. Generally, the computers that route the  
15 requests, their job is to route the requests in  
16 packets of data to the computers that store the  
17 data; the computer that stores the data then gives  
18 it back and that data is routed through a network  
19 of computers and that is what is known as the  
20 internet.

21 Q Okay. Back in 1992 and '93, your computers, your  
22 TouchNet kiosks were able to connect to Prodigy;  
23 is that correct?

24 A Correct.

25 Q At that time, they couldn't connect to the

Page 33

Page 35

1 internet through Prodigy because the internet  
2 didn't exist; is that correct?  
3 A The internet as we know it today was not -- the  
4 internet as we know it today as an entity did not  
5 exist. The internet in 1992 and 1993 generally  
6 was used to transfer files between military bases  
7 and universities and it used a bunch of different  
8 protocols. So the public was not using the  
9 internet in 1993. But it was just a matter of  
10 time to be able to then have access to those  
11 computers. I mean, it was -- our design was to be  
12 able to access information anywhere it was stored.  
13 Q The system that TouchNet had available in 1993  
14 could connect to Prodigy, correct?  
15 A Correct.  
16 Q Is there any difference between the system  
17 connecting to Prodigy in 1993 and the system  
18 connecting through Prodigy and to the internet  
19 today assuming Prodigy existed today?  
20 A No.  
21 Q There is no technical difference in the equipment?  
22 A The equipment is the same, different protocols may  
23 be used to be able to access the data that is  
24 stored on other places.  
25 Q And is the internet responsible for those

1 A The issue is providing access to data on other  
2 computers requires some sort of networking  
3 protocol. The internet -- there is no -- there is  
4 no entity called the internet. The internet is a  
5 collection of computers that can talk to each  
6 other. What we do is we can provide pay-per-use  
7 access to Prodigy in 1993 that could provide  
8 access to data on other computers, essentially the  
9 same thing that the internet -- what is now known  
10 as the internet is.  
11 Q So in your opinion, is there any difference  
12 between this system TouchNet had operating in 1993  
13 and how it functioned to connect to commercial  
14 on-line services, including the internet if it  
15 were available, as opposed to today when the  
16 internet is available through Prodigy?  
17 A No. I don't see any differences in the intent.  
18 The only difference might be the protocols it  
19 talked when it dialed up or what type of computer  
20 -- what type of computer it dialed to. The  
21 service, the access to information on an on-line  
22 service that we had in 1993 is essentially the  
23 same thing we have today.  
24 Q But when you say there is a difference in how you  
25 connect, wouldn't that be different for how you

Page 34

Page 36

1 protocols?  
2 A Well, the internet protocol has become the de  
3 facto standard of how computers talk. So how we  
4 talked to Prodigy in 1993 was a de facto standard  
5 to talk to Prodigy in 1993. As TCP/IP became  
6 widespread, that became the de facto way of  
7 communicating among different systems. We had the  
8 ability of talking to Prodigy and if Prodigy used  
9 TCP/IP, we could have done it that way also.  
10 Q With respect to using the internet, the only  
11 entity that could charge you for a pay per use  
12 service was an on-line service; is that correct?  
13 A Correct.  
14 Q The internet can't charge you itself?  
15 A Correct.  
16 Q There is no one operating it, the internet, as a  
17 commercial entity to charge you for the service?  
18 A Correct.  
19 Q In fact, what you refer to as the internet is  
20 merely just another connection mode that can be  
21 accessed through your on-line service provider; is  
22 that correct?  
23 A Correct.  
24 Q And you kind of shrugged there. Don't let me put  
25 words in your mouth if you want to expand on that.

1 connect through Prodigy to Telnet to Gopher, is  
2 that the difference you are referring to?  
3 A Telnet and Gopher are services that were other  
4 pre-world wide web services that were available  
5 for computers that were using the internet. And  
6 our service could have used those also. I'm not  
7 sure I am answering --  
8 Q Those services existed back in 1993?  
9 A Yes, they did.  
10 Q And you could have connected to those services  
11 through Prodigy?  
12 A If Prodigy had a -- if Prodigy had that available.  
13 And I don't know for a fact that they did, but  
14 they do now. And America On-Line does now. And  
15 they are essentially a list of services that are  
16 available to on-line users and on-line users can  
17 use what people term the internet.  
18 Q Just like they could have used Gopher or Telnet  
19 back in '93?  
20 A Yes.  
21 Q It is just another means for connecting to these  
22 different services; is that correct?  
23 A Yes.  
24 Q It is not a service in and of itself, the internet  
25 that is?

Page 37

1 A Right. The internet is not a service.  
 2 Q And there is no internet company to charge you on  
 3 a pay-per-use basis for that service, is there?  
 4 A Correct. There is no -- the internet is not an  
 5 entity that charges.  
 6 Q So today if somebody wanted to connect to the  
 7 internet through a company like Prodigy or  
 8 CompuServe, it is no different than it was in  
 9 1993?  
 10 A Correct.  
 11 MR. STITT: I'm done.  
 12 FURTHER EXAMINATION  
 13 BY MR. POLASEK:  
 14 Q Except to the extent that you couldn't connect to  
 15 the internet in 1993 through Prodigy, correct?  
 16 A I don't know that for a fact.  
 17 Q Okay. Well, then when you say there is no  
 18 difference, I mean, it is hard to say that in 1993  
 19 there was no difference in accessing Prodigy and  
 20 accessing the internet through Prodigy if you  
 21 don't know that you could have accessed the  
 22 internet through Prodigy in 1993?  
 23 A Well, as I said earlier, Prodigy uses a lot of  
 24 different -- I'm not an expert on Prodigy's  
 25 back-end system, but Prodigy offered many services

Page 38

1 that included access to remote computers, it  
 2 included access to airline tickets and shopping  
 3 and e-mail. It included all of these things. And  
 4 so Prodigy's computers had to talk to other  
 5 computers and it's my -- it is my contention that  
 6 they used services, internet protocol services to  
 7 do that.  
 8 Q But they were -- it is your testimony that they  
 9 were able to talk to discrete or specified  
 10 computers, OAG or the Kansas City newspaper or  
 11 something of that nature, correct? I mean, they  
 12 were specified and it was what Prodigy dictated?  
 13 A Our kiosk could talk to many different types of  
 14 computers. It could talk to specific services  
 15 like OAG or it could talk to a service like  
 16 Prodigy which could talk to anything else that  
 17 Prodigy could talk to. And in 1993, Prodigy was  
 18 an on-line service that accessed a lot of  
 19 different computers, essentially what we know as  
 20 the internet today.  
 21 Q So you are saying that in 1993 Prodigy accessed a  
 22 network of computers that is the same as what we  
 23 consider the internet to be today?  
 24 A No. What I'm saying is in 1993 Prodigy was a  
 25 public access to information that was stored on

Page 39

1 computers all across the country. And they may  
 2 have used these protocols, that we now  
 3 colloquially call the internet today. So a user  
 4 at our kiosk could access Prodigy and from Prodigy  
 5 they could access other services that were not  
 6 stored on Prodigy, just like today a user could  
 7 access America On-Line and then go out over the  
 8 web to get information from other terminals. In  
 9 1993, nobody knew what the internet was and so  
 10 essentially we provided access to what became  
 11 commonly known as the internet.  
 12 Q And one of the things you said is that they may  
 13 have had or may have used these connections,  
 14 correct?  
 15 A Correct. I said that, but I don't have knowledge  
 16 of how Prodigy architected their backbone or their  
 17 systems.  
 18 MR. POLASEK: Okay. That is fine. Do  
 19 you have any more?  
 20 MR. STITT: No.  
 21  
 22  
 23  
 24  
 25

Page 40

1 (Witness excused.)  
 2  
 3  
 4 JOHN F. MURPHY  
 5 Subscribed and sworn to before me this \_\_\_\_  
 6 day of \_\_\_\_\_, 19 \_\_\_\_.  
 7 My commission expires \_\_\_\_\_  
 8  
 9  
 10 Notary Public within and for  
 11 County, \_\_\_\_\_  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22 Mettke, Richard P. vs. TouchNet Information Systems  
 23  
 24  
 25